1954

Shirlee S. Scrivener v. Albert Scrivener : Brief of Appellant

Utah Supreme Court

Romney, Boyer and Ronnow; Attorneys for Appellant;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

In the Matter of the Estate of KENNETH G. SCRIVENER, *Deceased.*
SHIRLEE S. SCRIVENER, Executrix of the Estate of Kenneth G. Scrivener, deceased, *Appellant,*

vs.

ALBERT SCRIVENER and MRS. ALBERT SCRIVENER, as Trustees for Gregory Scrivener, a Minor, *Respondents.*

BRIEF OF APPELLANT
SHIRLEE S. SCRIVENER,
Executrix.

Case No. 8186

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BRIEF OF APPELLANT SHIRLEE S. SCRIVENER, Executrix

STATEMENT OF FACTS

Kenneth G. Scrivener, the deceased herein, died on January 3, 1953, as a result of an accident, and left surviving him a son, Gregory A. Scrivener, six years of age, and Shirlee S. Scrivener, his surviving widow. Gregory is the son of Kenneth G. Scrivener by a former marriage with Ruth E. Scrivener, which marriage terminated in divorce. (R. 20)

Kenneth G. Scrivener took out a policy of life

insurance on his life with the Prudential Insurance Company of America, dated June 20, 1949, which policy was in the face amount of Five Thousand and no/100 ($5,000.00) Dollars and contained a provision for double indemnity in the event of accidental death (Exhibit 1).

The original beneficiary named in the insurance policy was "Ruth E. Scrivener, wife, if living, otherwise Gregory A. Scrivener, son." A change of beneficiary was made on February 2, 1950, to "Alberta G. Scrivener, mother, if living, otherwise Gregory A. Scrivener, son." A further change of beneficiary was made on September 11, 1950, as follows: "If this policy matures by death the proceeds shall be payable in one lump sum to the executors or administrators of the insured." (Exhibit 1).

The insurance company paid to the Executrix of the Estate of Kenneth G. Scrivener the sum of Nine Thousand Nine Hundred Ninety-Five and 99/100 ($9,995.99) Dollars, made up as follows:

Amount of Policy No. 17 655 702		$5,000.00
Paid-up Additions dividends		10.69
Premiums deducted	$14.70	
Accidental Death Benefits		$5,000.00
		$9,995.99

(Exhibit 2).

The Third and Fourth paragraphs of the Last Will and Testament of the decedent, which was ad-

mitted to probate, are as follows:

"THIRD, I hereby give, devise and bequeath to my parents, MR. and MRS. ALBERT SCRIVENER, or the survivor of them, of Rochester, New York, my $5,000.00 life insurance with The Prudential Insurance Company of America, Policy #17655702, to be held in trust for the uses and purposes hereinafter set forth:

They, the said MR. and MRS. ALBERT SCRIVENER, or the survivor, as such trustees, shall have full power to manage and control the $5,000.00 principal derived from said life insurance policy, with the power to invest and reinvest same as they may see fit so to do for the purpose of educating, maintaining and supporting my son, GREGORY SCRIVENER, until such time as he shall reach the age of twenty-one years, at which time the said trustees are to pay over to my son, GREGORY, the balance, if any, of the $5,000.00, and after such payment, the said trustees shall then be discharged from any further liability on their part. PROVIDED, that if my parents predecease me, or that if they decease prior to the execution of said trust, I then request my brother, CLIFFORD G. SCRIVENER, of St. Louis, Missouri, be appointed substitute trustee, to be succeeded by my sister, MARY ELLEN WOODS of Rochester, New York, if need be.

"FOURTH, I hereby give, devise and bequeath the rest and remainder of my estate and property, be it real, personal or mixed, and wheresoever it may be situated, to my wife, SHIRLEE S. SCRIVENER, of Salt Lake City, Utah."

There is no dispute about the facts. The question is one of law, whether Gregory, the son and beneficiary of the Trust, or Shirlee S. Scrivener, the widow, is entitled to the proceeds of the double indemnity provision of the insurance policy. The lower Court held in favor of Gregory and the Executrix has appealed to this Court.

STATEMENT OF POINTS

POINT NO. I

THE BEQUEST IN TRUST FOR GREGORY IS LIMITED TO LIFE INSURANCE BENEFITS ONLY.

POINT NO. II

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ARGUMENT

POINT NO. I

THE BEQUEST IN TRUST FOR GREGORY IS LIMITED TO LIFE INSURANCE BENEFITS ONLY.

The essential parts of the Third paragraph of the Will of the above named decedent are as follows:

> "THIRD, I . . . give . . . to my parents . . . my *$5,000.00 life insurance* with The Prudential Insurance Company of America, Policy #17655702, to be held in trust for the uses and purposes hereinafter set forth: . . . such Trustees, shall have full power to manage and control the *$5,000.00 principal derived from said life insurance policy*, with the power to invest or reinvest same as they may see fit so to do for the purpose of educating, maintaining and supporting my son, Gregory Scrivener, until such time as he shall reach the age of twenty-one years, at which time the said *Trustees are to pay over to my son Gregory, the balance, if any, of the $5,000.00*, and after such payment, the said Trustees shall then be discharged from any further liability on their part." (Emphasis ours)

The following portion of the Third paragraph: "I . . . give . . . to my parents . . . my $5,000.00 life insurance with The Prudential Insurance Company of America, Policy #17655702" is fairly susceptible of only one interpretation, that is, that the subject

of the bequest is *life insurance* only. The Decedent made no bequest of the policy itself. Although the words and figures, "Policy No. 17655702" are used, yet according to the context and punctuation they are merely for identification and not a part of the bequest. Neither did the Decedent make a bequest of the proceeds of the Policy. Inasmuch as *life insurance* and not the Policy or the proceeds thereof was the subject of the bequest it follows, as will more fully be shown hereafter, that double indemnity benefits are not a part of the bequest to Gregory.

Further indication of a limitation of the bequest is found in the Third paragraph. The Trustees were to "have full power to manage and control the *$5,000.00 principal* derived from said life insurance policy," and after Gregory became 21 years of age the Trustees were directed "to pay over to my son Gregory the *balance, if any of the $5,000.00.*" Had the Decedent intended to give all of the proceeds of the policy in question to Gregory he would not have used the language quoted above, for such language is inconsistent with an intent to dispose of all of the proceeds of the Policy. It is a common thing for an insurance policy to have values other than the "principal," such as interest, dividends, and health benefits; and, as in this case, double indemnity accident benefits. Some, all, or part of such benefits may be made the subject of a bequest by Will, but if the bequest is described as "*$5,000.00 life insurance*" or "*$5,000.00 principal,*" such other benefits as the Policy may have are excluded there-

from. Appellant's contention is further supported by the fact that the Trustees were given power to "control the $5,000.00 principal *derived* from said life insurance policy." The word "derived" not only indicates the source of the fund but also implies only part or a portion of the whole thereof.

The intent of the Decedent to limit the bequest is further borne out by the fact that the Trust is limited to "*$5,000.00 principal.*" There is no provision in the Trust to cover the funds which the Respondents seek in this action. The Trustees are granted no power or right to control, dispose of or handle the funds which they are attempting to recover herein. The Decedent has made it clear that he never intended that the Trustees should administer anything other than the "*$5,000.00 principal*" mentioned in the Trust. Indeed the Decedent has provided that when Gregory reaches the age of 21 years the Trustees are directed to pay to him the balance, if any, of the $5,000.00.

Reference to the entire object is oft-times easier than to refer to a part of it. Such is true in this case. Had the Decedent intended that the whole of the Policy go for the benefit of his son Gregory it would have been a simple thing for him to have so provided. Likewise, had such been his intention, the subject of the Trust could have been described very easily; but, instead of using simple words and phrases to describe the entire Policy, the Decedent made a bequest of "*$5,000.00 life insurance*" and

instead of simply referring to the funds or proceeds of the Policy he described the subject of the Trust by the words and figures "$5,000.00 principal"; and again, to emphasize his intent, stated that the "*balance, if any, of the $5,000.00*" was to be given to Gregory on his reaching 21 years of age.

The Respondents would have this Court believe that the Decedent intended all of the proceeds of the Policy to go to Gregory. If there is any basis for the Respondents' contention it must be found in the dispositive portion of the Third Paragraph. The Trust portion of the paragraph has the limitations herein pointed out, which clearly do not support Respondents' contention and are inconsistent with the interpretation Respondents would have this Court place on the dispositive portion of the paragraph. It is a cardinal principal of construction that all parts of the Will must be read together and harmonized if possible. There is no harmony between the despositive and the Trust portions of the Third paragraph under Respondents' theory. However, according to Appellant's theory, there is no inconsistency in the provisions. Surely the Trust provisions cannot be ignored. It is submitted that the interpretation urged by the Appellant permits of harmony and consistency and gives full consideration to all portions of the Will, and properly reflects the intent of the Decedent.

POINT NO. II

THE CONTRACTS FOR LIFE INSURANCE AND DOUBLE INDEMNITY ARE SEPARATE AND DISTINCT.

The insurance policy provides for quarterly premiums and states, "Extra premium for accidental means death benefit (included in total premium) $1.30" Other provisions covering the contract for double indemnity or "accidental means death benefit," as it is called in the Policy, are found on Page 7 thereof. (Exhibit 1)

The law is clear that the contract for double indemnity is separate and distinct from the contract for insurance, although contained in the same policy. The following general statement is found in 44 C.J.S. 1286:

> "Life insurance policies containing provisions for double indemnity and disability provisions, for which separate premiums are paid are regarded as containing distinct contracts respecting different objects even though contained in one instrument."

New York Life Insurance Company vs. Davis, 5 Fed. Supp. 316. This case held that double indemnity and disability provisions of an insurance policy are severable if a separate premium is charged for them, and that the policy with respect to said benefits can be cancelled even after the life portion of

the contract cannot be cancelled by reason of the incontestability clause. In discussing this question the Court said on Page 319:

> "That the parties themselves considered that these provisions of the policy were severable may be gathered from the following language contained in the policy: 'Upon written request of the insured on any anniversary of this policy, and upon return of this policy for proper endorsement, the company will terminate this provision' and thereafter the premium shall be reduced by the amount charged for the double indemnity benefit."
>
> (NOTE: This is the same provision as found on Page 7 in the Scrivener policy)

Anair vs. Mutual Life Insurance Company, 42 Atl. 2d 423 (Vt.) 159 A.L.R. 547.

The policy was issued October 1, 1926, and provided for certain monthly payments if the Insured became totally and presumably permanently disabled before age sixty. The annual premium was $128.60, of which it is stated ($5.00 is the premium for the double indemnity benefit and $16.15 is the premium for disability benefits.) On November 12, 1935, the Insured assigned her right, title and interest in the policy to a bank, and on November 25, 1935, the bank authorized the Insurance company to pay all disability benefits to the Insured. This is an action by the Insured for the benefits. The Insurance company contended that the Insured had no right to sue for the reason that it claimed the Insured

had assigned the policy. It was held that the contract was divisible and that the Insured had a right of action for disability benefits even though the policy had been assigned, inasmuch as the bank had in effect reassigned to the Insured the right to the disability benefits.

The following is a statement by the Court:

> "The defendent says that the policy provides for the payment of a single premium and that this singleness of consideration is recognized by our cases as showing an entire contract. But here we do not have a single consideration within the meaning of these cases. The total premium of $128.60 is shown by the policy to be comprised of three different premiums, one of which for a specific amount is set forth as the premium for disability benefits. Thus the consideration was apportioned to the different covenants contained in the policy. The risks assumed by the defendant under the policy were distinct and severable with different premiums assigned to cover each of them. We conclude that the policy contract in question was not one entire contract, but constituted separate and distinct contracts. Russo v. New York Life Ins. Co. 158 Miss. 469, 128 So. 343, 69 A.L.R. 883; Armstrong v. Illinois Bankers Life Ass'n 217 Ind. 601, 29 NE 2d 415, 131 A.L.R. 769; 1 Am. Jur. Actions, pp 105, 106; Annotation, 69 A.L.R. 889."

Armstrong vs. Illinois Bankers Life Association, 29 NE 2d 415 (Ind.), 131 A.L.R. 769.

This was a policy for life insurance containing disability benefits, a separate premium being provided for each. It was held that where the insured assigned his rights under the policy to his wife, but retained his right to disability benefits that she could sue for a breach of the policy and he could maintain a separate action for disability benefits.

Russo vs. New York Life Insurance Company, 128 S. 343 (Miss.) 69 A.L.R. 883, held that where the policy contained separate provisions for sick benefits and life insurance on death of insured they give rise to separate causes of action and that an action on the life insurance provisions will not bar a later action for the disability benefits.

Chattanooga Sewer Pipe Works vs. Dumler, 120 S. 450 (Miss.) 62 A.L.R. 999. In this action the Plaintiff secured judgment against the Insured and garnisheed the New York Life Insurance Company to obtain the proceeds of a judgment which the Insured had obtained against the insurance company for disability benefits under the insurance policy. It was contended by the Defendant that the money was not subject to garnishment because it was exempt under a statute which provided that the proceeds of a life insurance policy not exceeding $5,000.00 should be exempt from the debts of the decedent. The Court action held that the disability benefits were not "proceeds of life insurance" and that they were not exempt under the statute and were subject to garnishment. The Court stated as follows:

"In the case at bar, the money involved is in no proper sense the proceeds of a life insurance policy. It is true that it arises out of one of the provisions of a policy of insurance on the life of the appellee, but this provision is a contract of indemnity wholly separate from the contract to pay a fixed sum upon the death of the insured."

POINT NO. III

THE BEQUEST IN TRUST FOR GREGORY DOES NOT INCLUDE DOUBLE INDEMNITY BENEFITS.

There is nothing in the Will from which it can be ascertained whether the Decedent at the time of its execution had in mind the double indemnity feature of the policy. However, we submit that whether he did or did not have such feature in mind makes no difference. If it be assumed that he did have double indemnity benefits in mind and intended to dispose of them in his Will, he failed to do so in the specific bequest, for the reason that the specific bequest covers life insurance only and does not cover double indemnity benefits.

On the other hand, if it be assumed that the Decedent did not have the double indemnity feature in mind at the time of excuting the Will, he made no provisions for disposing of the double indemnity benefit except in the residuary clause. It is axiomatic that for the Decedent to make a specific bequest

he must have the specific property in mind and the property must be so described as to be capable of identification. In re: Campbell's estate, 27 Utah 361, 75 Pac. 851.

A situation quite analagous to the case at hand is Waters vs. Hatch 79 SW 916 (Mo.)

The Will contained the following provision:

> "I hold two certificates in the Bankers Life Insurance Company . . . of $2,000.00 each ($4,000.00). It is my will that as soon as the insurance company pays the money that the notes of W. H. Hatch & Son . . . amounting to about the sum of $2,400.00 shall be paid first . . .
>
> "I give my widow $500.00
> I give to my daughter, Mrs. Vernon 500.00
> I give to my daughter, Mrs. Flower 500.00
> I give to my son,
> Frank Hatch, the bal. 100.00
>
> $4,000.00

Accumulations on the policy in the amount of $190.00 in excess of the amount stated in the Will were paid. It was contended by Frank Hatch that by reason of the words "the bal." that he was entitled to the additional accumulation. The Court, however, held that he was not entitled to anything more than $100.00, as provided for in the Will. In discussing this the Court said:

". . . It is lastly claimed that the appellant, Frank B. Hatch, is entitled to the $190.00 excess arising out of the $4,000.00 insurance policy . . . after paying the $2,400.00 due to the Bank, and after paying the specific legacies

. . . The Policy was for $4,000.00. The Will disposed of $4,000.00. By reason, however, of the payment of $100.00 on the policy after the Will was made, and before his death, and by reason of certain earnings of the company that the insured became entitled to, the policy yielded an excess of $190.00 over the face value. The claim of the appellant is based upon the words "the bal." on the line of the Will relating to this policy after Frank's name, and although this is followed by the figures "$100.00" it is contended that it was the intention to give him whatever remained of the policy, . . . The Appellant overlooks the point, however, that by so contending he admits that, so far as this devise to him is concerned, such a construction would subject the devise to him to a claim that it was thereby made general, and not definite and specific, and, if this is true, then the $100 named, as well as the excess of $190.00 would be subject to appropriation to the payment of debts and expenses of the estate. But aside from this, the claim that this $190.00 excess is a specific, or even a general, legacy is untenable. *It was not in the contemplation of the Testator when he drew the Will, and a part of it was not in existence at that time, and was therefore no part of a specific thing which he was separating from the balance of his estate and disposing of specifically.* The Appellant gets all of the specific legacy arising out of the in-

surance policy which his father intended that he have . . ." (Emphasis ours)

If Hatch, in the above case, was denied the accumulations of the policy, where the provisions of the Will gave him a specific amount from the policy but also indicated he was to have the "balance," it would seem that there is less merit to the claim of the Respondents herein to double indemnity benefits under the terms of the Will in this case, where the bequest is "*$5,000.00 life insurance*" and the Trust is limited as heretofore pointed out.

POINT NO. IV

BY MAKING HIS ESTATE THE BENEFICIARY OF THE INSURANCE POLICY THE DECEDENT EVIDENCED AN INTENTION TO LIMIT THE AMOUNT TO GO TO GREGORY.

The life insurance policy shows the following with respect to beneficiaries: (Exhibit 1) The original beneficiary named in the policy is Ruth E. Scrivener, wife, if living, otherwise Gregory A. Scrivener, son. A change of beneficiary was made on February 2, 1950, to Alberta G. Scrivener, mother, if living, otherwise Gregory A. Scrivener, son. A further change of beneficiary was made on September 11, 1950, which provides as follows: "If this policy matures by death the proceeds shall be payable in one sum to the Executors or Administrators of the insured." By changing the beneficiary

from individuals (first his former wife, then his mother, with his son as alternate beneficiary) to his estate, the Testator intended to limit the amount which was to go to his son, as by making his estate the beneficiary of the policy such had the effect of subjecting the proceeds of the policy to the claims of creditors and to other beneficiaries named in the Will.

CONCLUSION

We have made a thorough search but have been unable to find a case which is completely determinative of the problem involved in this case. We submit, however, that all of the facts and circumstances discussed herein point unmistakably to the fact that the Decedent never intended the double indemnity benefits of the policy to go to Gregory. Had the Decedent intended such benefits to belong to Gregory the easiest and surest method of effecting his intention would have been to make Gregory the beneficiary of the policy. Not having done this, the next easiest and simplest method would have been to make a bequest by Will of the policy or proceeds thereof to Gregory. Instead of doing either of these things the Decedent did practically the opposite. Gregory was formerly named alternate beneficiary in the policy. However, the Decedent changed the beneficiary from his mother and Gregory to his es-

tate and made a Will in which he bequeathed life insurance benefits, only, in trust for Gregory and placed the limitations on the Trust herein pointed out.

We submit that the lower Court erred in awarding judgment to the Respondents for the double indemnity benefits and that such judgment should be reversed.

Respectfully submitted,

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